Builders Distributors Sand & Gravel, Inc. and Dennis Chartier and Thomas Enlow. Cases 19-CA-12121 and 19-CA-12577

#### 15 March 1984

# SUPPLEMENTAL DECISION AND ORDER

# By Chairman Dotson and Members Zimmerman and Hunter

On 8 August 1983 Administrative Law Judge George Christensen issued the attached Supplemental Decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief and motion to strike portions of the Respondent's brief.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Builders Distributors Sand & Gravel, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall pay the amounts set forth in the Order.

# SUPPLEMENTAL DECISION

GEORGE CHRISTENSEN, Administrative Law Judge. On June 1, 1983, I conducted a hearing at Seattle, Washington, to try issues raised by a backpay specification issued on December 22, 1982, following the enforcement by the United States Court of Appeals for the Ninth Circuit on August 31, 1982 (688 F.2d 847) of a decision and order issued by the National Labor Relations Board (Board) on July 11, 1981, directing Builders Distributors Sand & Gravel, Inc. (Builders) to reinstate and make whole its employees Dennis Chartier and Thomas Enlow for any loss in earnings they suffered by virtue of their discriminatory discharges by Builders, with interest on the sums due.

Builders, either in its original formal response to the backpay specification or by amendment thereof at the hearing, conceded the backpay measure, comparison group, and mathematical calculations set out in the specification were appropriate and correct, but contended the amounts set forth as due to Chartier and Enlow were inaccurate because: (1) the discriminatees did not make suf-

ficient effort to mitigate their wage losses and (2) their interim earnings during portions of the backpay period were understated and contended the amounts due to each should be adjusted accordingly.<sup>1</sup>

The issues before me for resolution are: (1) whether Chartier and Enlow should be denied backpay for portions of the backpay period for failing to make sufficient effort to mitigate their wage losses; (2) whether their interim earnings during the backpay period were understated; and (3) what amount of backpay each is entitled to receive.

In the course of the proceeding, the parties were afforded full opportunity to adduce evidence, to examine and cross-examine witnesses, to argue, and to file briefs. Both the General Counsel and Builders filed posthearing briefs.

On the basis of my examination of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following findings and conclusions.

#### A. Facts

#### 1. Gross backpay

As appendices to the backpay specification, the General Counsel listed the amounts due to Chartier and Enlow in each of the four quarters of 1980 and 1981 based on formulae conceded by Builders as appropriate and accurate. Those calculations yield a total gross backpay the two would have received, had they been employed as truckdrivers during the period in question (February 15, 1980—November 1, 1981, for Chartier and February 29, 1980—November 1, 1981, for Enlow, of \$37,734.27 for Chartier and \$38,485.84 for Enlow).

I therefore find and conclude the gross amount due to Chartier is \$37,734.27 and to Enlow, \$38,485.84.

# Alleged failure to mitigate wage losses during the backpay period

Chartier and Enlow made regular and systematic efforts to find employment during the backpay period, sometimes together and sometimes separately, with limited success (Enlow, the older and more experienced driver, was more successful than Chartier in finding employment). They worked out plans to canvass the greater

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<sup>&</sup>lt;sup>1</sup> In view of our disposition of this proceeding we find it unnecessary to rule on the General Counsel's motion to strike portions of the Respondent's brief.

<sup>&</sup>lt;sup>1</sup> Builders in its posthearing brief also contended Chartier and Enlow were offered substantially equivalent employment on February 1, 1981, and therefore no backpay should be awarded either of them after that date (despite its admissions in its response to the specification to the accuracy of allegations within the specification to the effect Chartier and Enlow were entitled to reimbursement for their wage losses for a period extending from the dates of their respective discharges-February 13 and 29, 1980-to the date Builders offered them reinstatement to their former positions-November 1, 1981). In view of that admission and Builders' failure to raise or litigate the issue of whether a valid reinstatement offer was made on February 1, 1981, to "substantially equivalent" employment (the specification details the fact each was reemployed on that date as a laborer (they were truckdrivers when laid off and the pay they received subsequent to such reemployment was deducted as interim earnings while they were so employed)), I grant the General Counsel's posthearing motion to strike those portions of Builders' posthearing brief alleging it made an offer of substantially equivalent employment to Chartier and Enlow on February 1, 1981, and its contention no backpay should be awarded subsequent to that date.

Seattle area by sections, to save fuel costs and time, and applied for work at the premises of numerous employers, including Alaska Distributing Co., Basset Western, Daniels Trucking, Knowles Construction, John J. Kooy Trucking Co., Inc., McKinley Landscaping, Monore Quarry, Jerry Piercy Trucking, Pitordi Trucking Co., Inc., Provisioners Frozen Express, Red Ball Trucking, Van Sickle Trucking, Bobby Wolford Trucking, and a van company whose name Enlow could not recall.

Chartier and Enlow were employed as laborers by Builders during the first and second quarters of 1981; Enlow suffered an on-the-job injury during that employment and was unable to work until the third quarter. He received workmen's compensation payments while he was disabled. In the third quarter, he went to Alaska and secured employment there during the third and fourth quarters of 1981 for short periods with Alaska Distributing Co., McKinley Landscaping, and a van company whose name he could not recall (the employment was only for a few days). During the first portion of the backpay period Chartier, a single man, received few job offers and those were short term; he was aided during that period by family and friends; commencing in the fourth quarter of 1980 and extending to the fourth quarter of 1981, he lived in a church parsonage and received room and board in return for occasional services.2

Builders does not contend in its brief Enlow made insufficient effort to mitigate his wage losses; rather, it argues the fact Enlow found more work than Chartier did during the backpay period provides basis for a finding Chartier did not make sufficient effort to mitigate his wage losses, contending the deduction by the General Counsel of the value of the room and board provided by the church parsonage during the portion of the backpay period Chartier was not working for Builders, GNA Trucking, Knowles Construction, and Jerry Piercy was insufficient and some added sum should be deducted from the backpay due to Chartier.

I reject Builders' contentions; Chartier is a much younger and less experienced driver than Enlow and therefore less likely to secure employment than Enlow, particularly in the tight job market in the Seattle area; Chartier immediately accepted the laborer job Builders offered him in February 1981 and continued in that job until laid off; and I credit his testimony he diligently sought work during those portions of the backpay period he was unemployed.

I therefore find and conclude Chartier and Enlow are not disqualified from receiving backpay due to them under the terms of the Board and court order on the ground they failed to make sufficient effort to mitigate their wage losses during the backpay period.

# Alleged understatement of interim earnings during the backpay period

At the outset of the hearing, the General Counsel stated that Enlow, on reviewing the specification prior to the hearing, informed the General Counsel the specifi-

cation was inaccurate in that it failed to show the income he received in the third and fourth quarters of 1981 while he was in Alaska; i.e., his earnings from his employment by Alaska Distributing Co. and McKinley Landscaping. I thereupon granted the General Counsel's motion to amend the specification to include Enlow's earnings from those two sources, adjusting the net backpay accordingly. In the course of Enlow's testimony at the hearing, he volunteered the information he overlooked 3 days of employment by a van company whose name he could not remember, for which he was paid \$14.75 per hour (for a total of 23 hours). The backpay specification was amended accordingly, further reducing the net backpay figure.

From these amendments based on volunteered information, plus testimony by Enlow at one point he made two trips for John J. Kooy Trucking Co. rather than the one set out in the specification (testimony he later corrected, stating he was describing a trip for GNA Trucking (set out in the specification) as a second trip for Kooy, and that he only made one trip for Kooy), Builders argues I should draw the inference Enlow had additional interim earnings, which should also be deducted from the gross backpay figure.

I find the amendments to the specification setting out additional interim earnings for Enlow based upon his volunteered testimony and his corrected testimony concerning the Kooy-GNA mixup insufficient basis for a finding Enlow had additional earnings during the backpay period and a ground for making any further deductions from the gross backpay figure.

The General Counsel also stated that Chartier, on reviewing the specification prior to the hearing, informed the General Counsel the specification was inaccurate in that it failed to show income he received in the third quarter of 1980 for truckdriver work he performed for Jerry Piercy Trucking (2 days, for which he was paid \$140). I thereupon granted the General Counsel's motion to amend the specification to include those earnings and make a corresponding adjustment to the net backpay figure.

Builders does not contend that Chartier had additional earnings during the backpay period which should be deducted from the gross backpay figure.

# 4. The net backpay obligation

As noted heretofore, utilizing the formulae and comparison group accepted as appropriate and applicable by the General Counsel and Builders, Builders' gross backpay obligation over the entire backpay period to Enlow is \$38,485.84 and to Chartier, \$37,734.27.

In the course of the hearing, I granted the General Counsel's motion to amend the specification to correct several mistakes in arithmetic thereon, to correct errors in stated expenses, mileage figures, and stated receipts from workmen's compensation (as well as the added interim earnings discussed above). Taking all the additions and corrections into account, I find during the entire backpay period there should be deducted from the \$37,734.27 backpay due to Chartier under the terms of the Board and court order \$175 (earnings from GNA)

<sup>&</sup>lt;sup>2</sup> These findings are based on the uncontradicted testimony of Chartier and Enlow, mutual corrboration by the two of their joint efforts to seek work, and limited documentary corrboration.

Trucking), \$4761.76 (earnings from Knowles Construction), \$9600 (value of payment in kind from the church parsonage), \$140 (earnings from Piercy Trucking), and \$2,044 (earnings from Builders), for a net backpay figure of \$21,013.51 as the net backpay due to Chartier under the terms of the order. After taking the same additions and corrections into account vis-a-vis Enlow. I find during the entire backpay period there should be deducted from the \$38,485.84 backpay due to Enlow under the terms of the order \$2,466.96 (gross earnings from GNA Trucking less expenses of \$114), \$735.95 (gross earnings from Wolford Trucking less expenses of \$109.05), \$127.43 (gross earnings from Provisioners Express less expenses of \$6), \$3987.50 (gross earnings from Pitordi Trucking less expenses of \$412.50), \$39.60 (earnings from Alderwood Manor), \$211.75 (earnings from Koov Trucking), \$1260 (earnings from Builders), \$3104.05 (workmen's compensation payments), \$1558.20 (earnings from Alaska Distributors), \$1044.13 (earnings from McKinley Landscaping), and \$339.25 (earnings from a van compa-

ny in Alaska whose name Enlow could not recall), for a net backpay figure of \$23,620.02.

Therefore on the basis of the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, Builders Distributors Sand & Gravel, Inc., Columbus, Ohio, its officers, agents, successors, and assigns, shall pay to Dennis Chartier the sum of \$21,013.51 and to Thomas Enlow the sum of \$23,620.02, plus interest on those sums calculated in the manner set out in F. W. Woolworth Co., 90 NLRB 289 (1950), and computed in accordance with the formulae set out in Florida Steel Corp., 231 NLRB 651 (1977), and Isis Plumbing Co., 138 NLRB 716 (1962).

<sup>&</sup>lt;sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.